Supreme Court, U.S.
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No. 04-315

IN THE

Supreme Court of the United States

WILFERT BROS. REALTY COMPANY, ET AL.,
Petitioners,

v.

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION, ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS

JOINT BRIEF OF RESPONDENTS IN OPPOSITION

THOMAS F. REILLY
Attorney General
of Massachusetts

ROBERT L. QUINAN, JR.
Assistant Attorney General
1 Ashburton Place, Room 2019
Boston, Massachusetts 02108
(617) 727-2200, ext. 2554

ADDITIONAL COUNSEL LISTED
ON INSIDE FRONT COVER

ROBERT S. MANTELL*
RODGERS, POWERS &
SCHWARTZ, LLP
18 Tremont Street, S. 500
Boston, MA 02108
(617) 742-7010, ext. 305

AMY L. HANSON
DAILEY & ASSOCIATES
P.O. Box 517
West Bridgewater, MA
(508) 588-4800

**Counsel of Record*

ADDITIONAL COUNSEL FOR RESPONDENTS

In the proceedings below, four separate cases were consolidated for decision. Each respondent has been represented by two or more attorneys.

In addition to Attorney General Reilly and Assistant Attorney General Quinan, the MCAD is represented here by:

STEVEN S. LOCKE
LYNN MILINAZZO-GAUDET
WENDY CASSIDY
MASSACHUSETTS COMM'N AGAINST DISCRIMINATION
One Ashburton Place
Room 601
Boston, MA 02108
(617) 994-6000

In addition to Attorney Mantell, Geraldine Ross is represented by:

HAROLD L. LICHTEN
SHANNON LISS-RIORDAN
PYLE, ROME, LICHTEN, EHRENBERG & LISS-RIORDAN, P.C.
18 Tremont Street
Suite 500
Boston, MA 02108
(617) 367-7200

Brenda Raffurty is represented by (in addition to Attorney Hanson):

JAMES F. ROGERS
DAILEY & ASSOCIATES
P.O. Box 517
West Bridgewater, MA 02379
(508) 588-4800

David Keeling is represented by (in addition to Attorney Mantell):

KEVIN G. POWERS
RODGERS, POWERS & SCHWARTZ, LLP
18 Tremont Street, S. 500
Boston, MA 02108
(617) 742-7010

Questions Presented

The Petitioners have presented a single question, which reads as follows:

1. Does a state statute that permits employees claiming employment discrimination, but not employers accused of such discrimination, to remove the case to state court for a jury trial violate the Equal Protection Clause of the Fourteenth Amendment?

Respondents present the following additional questions for this Court's consideration:

2. May this Court consider the Petition for Writ of Certiorari even though the petition was filed twenty-eight days late?

3. Should this Court consider an argument based on the Fourteenth Amendment of the United States Constitution, where the Petitioners failed to raise any argument relating to the Fourteenth Amendment until they submitted a petition for rehearing *after* the highest state court issued its decision?

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Jurisdiction

Respondents do not concede that this Court has jurisdiction to consider the Joint Petition for a Writ of Certiorari ("Pet."). Here, jurisdiction should be denied because the federal question sought to be reviewed was never presented to the state trial court, the state court of appeals, or the state supreme court until Petitioners filed an untimely petition for rehearing following issuance of a decision by the Massachusetts Supreme Judicial Court. In addition, a petition for writ of certiorari to review an order in a civil case entered by a state court of last resort must be filed with the Clerk of the United States Supreme Court within 90 days after entry. Supreme Court Rules 13.1 and 13.3. This Petition for Writ of Certiorari was not filed until 118 days after the order in question was entered. Therefore, the Court should deny the Petitioners' untimely certiorari petition.[1]

Statement of the Case

For purposes of this Brief in Opposition to the Petition for Writ of Certiorari, the respondents -- David Keeling, Brenda Raffurty, Geraldine Ross, and the Massachusetts Commission Against Discrimination -- accept and incorporate by reference the facts set forth in the decision of the Massachusetts Supreme Judicial Court, as well as that court' discussion of the relevant statutory framework. *Stonehill College v. Massachusetts*

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[1] The decision below merely disposed of four interlocutory appeals and hence there is also an issue regarding the finality of the case for jurisdictional purposes. *See* 28 U.S.C. § 1257(a) (2000).

Commission Against Discrimination, 441 Mass. 549, 808 N.E.2d 205 (2004) (reproduced in the Appendix to the Petition for Writ of Certiorari ("Pet. App.") at 1a to 57a).

Some aspects of the pertinent Massachusetts law merit emphasis:

The Massachusetts anti-discrimination statute, Mass. Gen. Laws ch. 151B, prohibits various forms of employment discrimination. Complainants (those alleging to be victims of employment discrimination) may elect to litigate their Chapter 151B claims in administrative proceedings conducted by the Massachusetts Commission Against Discrimination ("MCAD"). M.G.L. ch. 151B, § 5. If a complainant seeks to pursue remedies within the MCAD, neither the complainant nor the respondent is entitled to a jury trial. M.G.L. ch. 151B, § 5; *Stonehill College*, 441 Mass. at 566, 808 N.E.2d at 218-219; Pet. App. 21a-22a.

In the alternative, complainants may "remove" their cases from the MCAD and file civil actions in probate or superior court. M.G.L. ch. 151B, § 9. When a complainant files in probate court, neither the complainant nor the respondent is entitled to a jury trial. *Stonehill College*, 441 Mass. at 566 n.20, 808 N.E.2d at 219 n.20; Pet. App. 22a. If a complainant pursues her claim in superior court, however, both parties enjoy equal access to a jury trial. *Stonehill College*, 441 Mass. at 566, 808 N.E.2d at 218-219; Pet. App. 22a.

The important point to keep in mind is that within each forum (the MCAD, probate court or superior court), complainants and respondents have equal rights to claim a jury trial. *Id.*

Petitioners take issue with the fact that complainants are entitled to select the forum, and thereby are placed in the position of inviting or barring a jury trial. As will be shown below, the law in general often affords complainants the opportunity to choose among various forums, and such opportunities do not implicate Equal Protection Clause concerns, even if the choice has an impact on whether a jury trial will take place.

Reasons for Denying the Petition

I. PETITIONERS FAILED TO FILE A TIMELY PETITION *(An Untimely Motion For Rehearing Does Not Toll The 90-Day Jurisdictional Requirement Of Rule 13.1)*

A petition for writ of certiorari to review an order in a civil case entered by a state court of last resort must be filed with the Clerk of the United States Supreme Court within 90 days after entry of judgment. Rules 13.1 and 13.3. The time for filing of appeals is extended when a party has filed a timely petition for rehearing. Rule 13.3. More specifically, the second sentence of that rule reads, in relevant part, as follows:

> [I]f a petition for rehearing is **timely** filed in the lower court by any party, the time to file the petition for a writ of certiorari for all parties (whether or not they requested rehearing or joined in the petition for rehearing) runs from the date of the denial of the petition for rehearing or, if the petition for rehearing is granted, the subsequent entry of judgment.

Supreme Court Rule 13.3 (emphasis supplied). "The filing of an untimely petition for rehearing which is not entertained or considered on its merits, or a motion for leave to file such a petition out of time, if not acted on or if denied by the trial court, cannot operate to extend the time for appeal." *Bowman v. Loperena*, 311 U.S. 262, 266 (1940); *see also Pfister v. Northern Illinois Finance Corp.*, 317 U.S. 144, 150 (1942). "Only when the lower court changes matters of substance, or resolves a genuine ambiguity, in a judgment previously rendered should the period within which an appeal must be taken or a petition for certiorari filed begin to run anew." *Federal Trade Comm'n v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 211 (1952).

Under Massachusetts law, a petition for rehearing is timely if "filed with the clerk of the appellate court within fourteen days after the date of the rescript unless the time is shortened or enlarged by order." Mass. R. App. P. 27(a). The Supreme Judicial Court docketed the rescript of the *Stonehill College* decision on May 6, 2004. Respondents' Supplemental Appendix ("S.A.") at 7 (Paper no. 31). The Joint Petition for Rehearing and a Motion to File Petition for Rehearing Late were not filed until twenty-two days later, making such a petition for rehearing untimely. S.A. 8 (Papers nos. 36 & 37). The court neither acted on the Petitioners' Joint Motion to File Petition for Rehearing Late, nor enlarged the time to file by order. *Id.* It summarily denied the petition for rehearing without giving any indication of having ruled on its merits. *Id.* (Paper no. 38).

Since the request for rehearing was untimely, it does not restart the clock for filing the petition for writ of certiorari. *See Pfister*, 317 U.S. at 150 ("an untimely petition for rehearing . . .

which is not entertained or considered on its merits" does not extend the time to appeal from the original order). As the rescript containing the final order[2] that Petitioners seek to have reviewed here issued on May 6, 2004, the deadline for filing a petition for writ of certiorari was August 4, 2004. The Petitioners did not file their request for certiorari review with the Clerk until September 1, 2004, well beyond the deadline set by Rule 13.1. Thus, the Petitioners have lost their opportunity for Supreme Court review, and their certiorari petition must be denied.

II. THE RECORD IS INSUFFICIENTLY DEVELOPED TO MERIT SUPREME COURT REVIEW.

The Petition for Writ of Certiorari should also be denied because Petitioners admit that the federal question they are presenting here was not raised until Petitioners' late-filed petition for rehearing. Pet. 19. *See Mishkin v. New York*, 383 U.S. 502, 512-513 (1966); *Walters v. City of St. Louis*, 347 U.S. 231, 233 (1954). Generally, a constitutional question is urged too late if put forward for the first time upon a petition for rehearing. *See American Surety Co. v. Baldwin*, 287 U.S. 156, 162-164 (1932) (federal claim based on Fourteenth Amendment first raised in rehearing could not serve as basis for review by Court). Petitioners bear the burden of demonstrating that they presented the federal constitutional claim "with fair precision and in due time." *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928); *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 85-86

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[2] The final sentence of the *Stonehill College* decision states, however, that "the four cases [consolidated for decision] are to stand for further proceedings in the Superior Court." Pet. App. 35a.

n.9 (1980). Importantly, the Massachusetts Rules of Court did not afford the Respondents any opportunity at the rehearing stage to respond to Petitioners' Fourteenth Amendment argument. *See* Mass. R. App. P. 27(a) ("No answer to a petition for rehearing will be received unless requested by the quorum or panel.").

Indeed, the instant pleading represents the first time in which any Respondent has addressed the Petitioners' Fourteenth Amendment argument. Therefore, the record is woefully underdeveloped, and as such this case does not afford an appropriate opportunity for the Supreme Court to address the question presented.

Petitioners attempt to excuse the untimely assertion of their purported Fourteenth Amendment equal protection claim by arguing that the Massachusetts Supreme Judicial Court took an unexpected step in *Stonehill College* in overturning a key precedent: *Lavelle v. Mass. Comm'n Against Discrim.*, 426 Mass. 332, 426 N.E.2d 1331 (1997). *See* Pet. 19 (citing *Pruneyard Shopping Ctr.*, 447 U.S. at 85-86 n.9 (1980)). However, in 2003 the Supreme Judicial Court clearly signaled its intention to review the soundness of its precedents in this area. S.A. 5 (Paper no. 6.5). In its *Stonehill College* decision, the court stated:

> We . . . invited interested parties to submit briefs concerning . . . the correctness of this court's holding in *Dalis v. Buyer Advertising, Inc.*, 418 Mass. 220, 223 (1994) . . . . Necessarily contained in that request was a corollary issue calling for the parties and interested parties also to

> express views on the subsequent extension of the *Dalis* holding, in *Lavelle*, *supra*, to respondents in administrative proceedings before the MCAD pursuant to G.L. c. 151B, § 5[.]

Stonehill College, 418 Mass. at 551, Pet. App. at 4a. No employer-petitioner made any argument based on the Federal Constitution until after their loss in the Supreme Judicial Court, even though many briefs were filed either supporting or inviting the reversal of *Lavelle*. At least some of the petitioners clearly contemplated that *Lavelle* was in jeopardy and made arguments against *Lavelle*'s reversal.[3] Contrary to Petitioners' arguments that they were surprised by the reversal of *Lavelle*, the *Stonehill College* court expressly stated that it was *not* announcing a new principle whose resolution was not clearly foreshadowed. *See Stonehill College*, 441 Mass. at 569-570, Pet. App. at 26a. Taking into account (1) the Petitioners' arguments against the reversal of *Lavelle*, (2) the invitation by the court to submit briefs on the underpinnings of *Lavelle*, and (3) the court's acknowledgement that the ultimate result was foreshadowed, there can be no justification for the failure to raise any federal

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[3] *See* S.A. 10 (Keyland Corporation's Supplemental Brief on Issue of Whether *Dalis v. Buyer Advertising, Inc.* Was Correctly Decided, p. 10) ("[I]f *Dalis* is overruled, the [Court] should not overrule *Lavelle*"). *See also* S.A. 12 (Brief for New England Legal Foundation, Associated Industries of Massachusetts, and Boston Area Management Attorneys Group as *Amici Curiae*, p. 5) ("This Court has invited amici to address the question of whether *Dalis* was correctly decided. Amici here respectfully suggest that the issues before the Court are better addressed by a reexamination of the holding in *Lavelle*.").

constitutional question until after an unsuccessful appeal to the State's highest court.

III. THE COURT SHOULD DENY THE PETITION BECAUSE THERE IS NO SPLIT BETWEEN TWO OR MORE HIGHEST STATE COURTS CONCERNING THE IMPACT, IF ANY, OF THE FOURTEENTH AMENDMENT ON ACCESS TO JURY TRIALS.

The Petitioners urge the Court to accept this case because allegedly "there is an ever-deepening divide between the highest courts of various states concerning" the question whether the Equal Protection Clause of the Fourteenth Amendment mandates that equal forum selection rights (and jury trial access) be afforded those charged with discrimination and the victims of such discrimination. Pet. 11. The Court should deny the certiorari petition because the *Stonehill College* decision does not create an active split among state courts. Rather, the cases identified by Petitioners illustrate nothing more than varying applications of different state constitutions. All of the cases involving this issue turn on the interpretation of *state* constitutions, and not any interpretation of the federal Constitution.

The Petitioners assert that a divide has formed between Hawaii and Rhode Island, on the one hand, and Missouri and Tennessee, on the other. However, the Petitioners themselves acknowledge that neither Missouri nor Tennessee relied on federal grounds. Pet. at 13 ("Missouri Supreme Court did not expressly rest its decision on any federal equal protection argument") ("Tennessee courts' decisions do not consider a

federal equal protection challenge either."). The Petitioners, in an effort to manufacture a false dichotomy, assert that Hawaii's highest court adopted a Fourteenth Amendment analysis when making its ruling. Pet. at 12; *see SCI Management Corp. v. Sims*, 71 P.3d 389, 401-403 (Haw. 2003). Such a position flies in the face of the express language of the *SCI Management* court, which stated that it was *not* deciding the case on the basis of the Fourteenth Amendment to the United States Constitution. *See SCI Management*, 71 P.3d at 395 n.8 (failure to raise Fourteenth Amendment challenge resulted in waiver). Finally, the Petitioners argue that *FUD's Inc. v. Rhode Island*, 727 A.2d 692, 697-98 (R.I. 1999), was decided on Fourteenth Amendment grounds. Not only was this decision devoid of any reference to the Fourteenth Amendment or federal claims, the Rhode Island Supreme Court expressly decided the case on Article 1, section 15, of the Rhode Island State Constitution. *See id.* at 695.[4]

According to Rule 10, "[r]eview on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons." One such reason is when a state court of last resort has decided an important federal question in a way that conflicts with the

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[4] Furthermore, the Rhode Island Legislature effectively mooted the state law problem originally presented in *FUD's Inc.* by enacting R.I. Stat. § 28-5-24.1(c) (1999) (permitting respondents to elect--within 20 days of a probable cause finding--to end agency proceedings and have the case heard in court). In doing so, the state availed itself of the opportunity to correct any perceived *state law* constitutional defect. There is thus no divide among the states on any federal constitutional issue.

decision of another state court of last resort. *See* Rule 10(b). However, the purported conflict the Petitioners posit does not implicate the federal Constitution. Rather, all cases cited by Petitioners are based solely upon state law. Thus, the Court should decline to exercise its judicial discretion to grant the certiorari petition as there is no compelling federal reason for it to act.

IV. THERE IS NO FEDERAL CONSTITUTIONAL RIGHT TO A JURY TRIAL WHERE A DISCRIMINATION CLAIM ASSERTED UNDER A STATE STATUTE IS TRIED IN A STATE COURT OR ADMINISTRATIVE FORUM.

Even if this certiorari petition is not jurisdictionally barred, the Court should not entertain its discretion to grant the petition because the Petitioners' arguments lack merit. Petitioners contend that their right to a jury trial in state court or state administrative proceedings is a "fundamental right." Pet. at 15, 17 nn. 5, 18. Labeling their desire for a jury trial as a "fundamental right," Petitioners seek to lend gravitas to their theory that they have been unjustifiably denied equal protection of the laws. However, for purposes of federal equal protection review, there is no "fundamental right" at issue here.

The right to trial by jury in civil cases guaranteed by the Seventh Amendment of the Constitution of the United States has not been made applicable to the States through the Fourteenth Amendment. *Curtis v. Loether*, 415 U.S. 189, 192 n.6 (1974). States are free to regulate trials in their own courts in their own way, and they may reject the option of jury determination.

Walker v. Sauvinet, 92 U.S. 90, 92-93 (1875). Indeed, Petitioners do not, and cannot, argue that they are entitled to a jury trial under the Seventh Amendment.[5]

Given that States are empowered to accord or withhold jury trials for actions in state courts or proceedings at their whim, the fact that a state law has blocked an employer from a guaranteed jury trial in state court is of no special concern from the point of view of the Federal Constitution.[6] Therefore, there is no federal "fundamental right" to a jury trial under these circumstances. *See Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 312-313 & n.3 (1976) (listing examples of fundamental rights which spring from substantive protections arising directly from the Federal Constitution). As no

[5] While it is true that the Seventh Amendment will afford parties the right to a jury trial if a M.G.L. ch. 151B claim is tried in federal court, *Gallagher v. Wilton Enterprises, Inc.*, 962 F.2d 120, 123-24 (1st Cir. 1992); Pet. 15, none of the complainants brought federal court proceedings in this case. Thus, the Seventh Amendment is completely inapplicable.

[6] If the Petitioners were raising a Massachusetts equal protection claim, the right to a jury trial would be considered a "fundamental right." That is because the right to a jury (*if* the parties find themselves in superior court) is guaranteed by the Massachusetts Constitution. *See Lavelle*, 426 Mass. at 333, 688 N.E.2d at 1332-1333, *overturned in part by Stonehill College*, 441 Mass. at 561-562, 808 N.E.2d at 215-216 (describing the right to a jury as a fundamental right, and citing to Article 15 of the Massachusetts Declaration of Rights). However, there is no such right guaranteed by the United States Constitution, which is the sole ground underlying the Petitioners' certiorari petition.

"fundamental right" is at issue, complainants may be treated differently from respondents based on "rational basis" scrutiny. *Murgia*, 427 U.S. at 313-314.[7]

In finding that there were no equal protection issues with the M.G.L. ch. 151B procedural scheme, the Massachusetts Supreme Judicial Court quoted the case of *Panama Railroad Co. v. Johnson*, 264 U.S. 375 (1924):

> There are many instances in the law where a person entitled to sue may choose between alternative measures of redress and modes of enforcement; and this has been true since before the Constitution. But it never has been held, nor thought so far as we are advised, that to permit such a choice between alternatives otherwise admissible is a violation of due process of law. In the nature of things, the right to choose cannot be accorded to both parties, and, if accorded to either, should rest with the one seeking redress rather than the one from whom redress is sought.

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[7] Here, the Massachusetts Legislature has drawn distinctions between employees and employers, and has afforded employees the choice of forum. Such distinctions are subject only to rational basis scrutiny. *See Hodel v. Indiana*, 452 U.S. 314, 331 (1981) ("Social and economic legislation . . . that does not employ suspect classifications or impinge on fundamental rights must be upheld against equal protection attack when the legislative means are rationally related to a legitimate government purpose"); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 212-213 (1995).

Id. at 392-393.

Petitioners seek to distinguish the *Panama R.R.* case on the grounds that it does not involve a "fundamental right." Pet. at 17 n.5. However, as shown above, for the purpose of Equal Protection Clause analysis, there is no federal fundamental right involved in *this* case either. Therefore, to permit complainants to select the forum does not violate the federal Constitution.

V. THE MASSACHUSETTS STATUTORY SCHEME DOES NOT DENY EMPLOYERS JURY TRIALS FOR CLAIMS ARISING UNDER FEDERAL ANTI-DISCRIMINATION STATUTES.

The Petitioners incorrectly imply that employers are being denied jury trials to which they are entitled under federal anti-discrimination statutes. Pet. at 15. It is true that various federal statutes (such as Title VII and the ADA) accord the parties the right to a jury trial once a civil action is initiated under one of those statutes. Pet. at 15 n.3. However, in the cases below, no complainant sought to recover under a federal statute, and no civil action was ever initiated by a complainant.

A victim of discrimination must initiate her claim by filing an administrative charge, either in the MCAD or Equal Employment Opportunity Commission. These agencies have a work-sharing agreement, whereby a complaint filed with one agency will also be deemed filed with the other. Thus, a charge filed with the MCAD may well include allegations of violations of federal statutes such as Title VII, the Americans with Disabilities Act, and the Age Discrimination in Employment Act.

However, if the complainant seeks to pursue her claims in the MCAD, she must forego her federal claims. The MCAD does not rule on issues of federal law. *See New Bedford v. MCAD*, 440 Mass. 450, 462 n.24, 799 N.E.2d 578 (2003). The MCAD is not empowered to hold a public hearing to determine whether there has been a violation of federal law. *McGowan v. Stoneham Police Dept.*, 4 MDLR 1109, 1120 & n.3 (1982), 1982 Mass. Comm. Discrim. Lexis 53, at 13 & n.3. Petitioners fail to identify a single example of any final decision of the MCAD that turns on federal law.

Therefore, Petitioners mount a straw argument when they claim that employers can stand accused of violations of federal statutes and yet be "trapped" in the MCAD without a jury trial. Pet. at 15. To the extent that a claim proceeds to a public hearing at the MCAD, the only issue involved is whether M.G.L. ch. 151B was violated.[8] The MCAD simply has no jurisdiction to enforce Title VII or other federal statutes, and therefore, Petitioners are not being denied any rights under federal law.

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[8] There is nothing new in permitting the complainant to pursue or delete claims in such a manner as to compel a certain forum. For example, a plaintiff may defeat federal subject matter jurisdiction by omitting parallel federal claims, despite the fact that such claims are available. *See Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (1987). On the other hand, defendants may remove actions from state courts, even when the change of forum may affect procedural rights such as the right to a jury. 28 U.S.C. §§ 1441(a) & 1446(a); *see Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*, 356 U.S. 525, 533-540 (1958).

Conclusion

For all of the reasons stated above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

THOMAS F. REILLY
Attorney General
of Massachusetts

ROBERT L. QUINAN, JR.
Assistant Attorney General
1 Ashburton Place, Room 2019
Boston, Massachusetts 02108
(617) 727-2200, ext. 2554

STEVEN S. LOCKE
LYNN MILINAZZO-GAUDET
WENDY CASSIDY
Massachusetts Commission
Against Discrimination
One Ashburton Place
Room 601
Boston, MA 02108
(617) 994-6000

ROBERT S. MANTELL
KEVIN G. POWERS
Rodgers, Powers & Schwartz
18 Tremont Street, S. 500
Boston, MA 02108
(617) 742-7010, ext. 305

AMY L. HANSON
JAMES F. ROGERS
Dailey & Associates
P.O. Box 517
West Bridgewater, MA
(508) 588-4800

HAROLD L. LICHTEN
SHANNON LISS-RIORDAN
Pyle, Rome, Lichten, Ehrenberg
& Liss-Riordan, P.C.
18 Tremont Street, Suite 500
Boston, MA 02108
(617) 367-7200

Dated: October 8, 2004

Counsel for Respondents

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Appendix A

SUPREME JUDICIAL COURT
for the Commonwealth
Case Docket

STONEHILL COLLEGE vs. MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION & another

SJC-09112

CASE HEADER

Case Status	Pet'n rehearing denied	**Status Date**	06/03/2004
Nature	Discrimination law	**Entry Date**	09/30/2003
Appellant	Plaintiff	**Case Type**	Civil
Brief Status		**Brief Due**	
Quorum	Marshall, C.J., Greaney, Ireland, Spina, Cowin, Sosman, Cordy, JJ.		

APPENDIX A

S.A. 1

Argued Date	02/03/2004	**Decision Date**	05/06/2004
AC/SJ Number	2003-P-0870	**Citation**	441 Mass. 549
DAR/FAR Number	DAR-13558	**Lower Ct Number**	BRCV2002-01427
Lower Court	Bristol Superior Court	**Lower Ct Judge**	David A. McLaughlin, J.
Route to SJC	Direct Appellate Review		

INVOLVED PARTY	ATTORNEY APPEARANCE
Stonehill College	M. Robert Dushman, Esquire
Plaintiff/Appellant	Amanda Buck Varella, Esquire
Blue br & appendix transf w/case	
18 Main Br., 15 App., 18 Reply Br.	
MA Comm. Against Discrimination	Beverly I. Ward, Esquire
Defendant/Appellee	Steven Locke, Esquire
Red brief transferred w case	Robert L. Quinan, Jr., A.A.G.
19 Main Br.	
Soo Tang Tan	Nancy S. Shilepsky, Esquire
Defendant/Appellee	Lawrence J. Casey, Esquire
Red brief transferred w case	Patricia A. Washienko, Esquire
18 Main Br.	Michael A. Bean, Esquire
Nat'l Employment Lawyers Assoc.	James S. Weliky, Esquire
Amicus	Laura M. Unflat, Esquire

New England Legal Foundation Amicus Amicus brief filed 7 Main Br.	Christine Hughes, Esquire
Associated Industries of MA Amicus On brief of another party	Christine Hughes, Esquire
Boston Area Management Attorneys Amicus On brief of another party	Arthur G. Telegen, Esquire Anjali Parekh Prakash, Esquire Richard L. Alfred, Esquire Sally Adams, Esquire James M. Paulson, Esquire Joel P. Suttenberg, Esquire
Jewish Alliance for Law & Social Amicus Amicus brief filed 1 Main Br.	
MA Employment Lawyers Assoc. Amicus Amicus brief filed 18 Main Br.	James S. Weliky, Esquire Laura M. Unflat, Esquire
American Civil Liberties Union Amicus Amicus brief filed 18 Main Br.	Sarah R. Wunsch, Esquire Anne L. Josephson, Esquire Ellen J. Zucker, Esquire James S. Weliky, Esquire Nadine Cohen, Esquire
Women's Bar Association of MA Amicus	Sarah R. Wunsch, Esquire Anne L. Josephson, Esquire

On brief of another party	Ellen J. Zucker, Esquire James S. Weliky, Esquire Nadine Cohen, Esquire Sarah R. Wunsch, Esquire Anne L. Josephson, Esquire
Lawyers' Comm. for Civil Rights Amicus On brief of another party	Ellen J. Zucker, Esquire James S. Weliky, Esquire Nadine Cohen, Esquire Sarah R. Wunsch, Esquire Anne L. Josephson, Esquire
Gay & Lesbian Advocates & Defs. Amicus On brief of another party	Ellen J. Zucker, Esquire James S. Weliky, Esquire Nadine Cohen, Esquire Sarah R. Wunsch, Esquire Anne L. Josephson, Esquire
MA Lesbian and Gay Bar Assoc. Amicus On brief of another party	Ellen J. Zucker, Esquire James S. Weliky, Esquire Nadine Cohen, Esquire

DOCKET ENTRIES

Entry Date	Paper	Entry Text
09/30/2003	#1	Entered. Notice to counsel.

09/30/2003		Transferred from Appeals Court: Plaintiff/Appellant's Brief and Record Appendix (7) copies of each. Defendant/Appellee's (MCAD) Brief (7) copies. Defendant/Appellee's (Soo Tang Tan) Brief (7) copies.
10/02/2003	#2	Additional 11 copies of each Appellant's Brief & Appendix filed by Stonehill College.
10/02/2003	#3	SERVICE of appellant's reply brief for Stonehill College by M. Robert Dushman, Esquire.
10/03/2003	#4	Additional 11 copies of Brief filed by Soo Tang Tan.
10/07/2003	#5	Additional 12 copies of Brief filed by Massachusetts Commission Ag'st Discrimination.
10/16/2003	#6	ORDER (By the Court): This case will be argued at the court's February, 2004 sitting. The parties may, if they wish, file supplemental briefs or memoranda on or before January 15, 2004, on the question whether Dalis v. Buyer Advertising, Inc., 418 Mass. 220 (1994), was correctly decided. See attached copy of amicus announcement. (Notice to counsel.)
10/16/2003	#6.5	ANNOUNCEMENT: These cases (SJC-9002, -9081, -9100 and -9112) involve a variety of issues regarding the assertion of jury trial rights by parties that were respondents in proceedings before the MCAD. See Lavelle v. MCAD, 426 Mass. 332 (1997). Amici are invited to address the various issues raised by the parties as well as the additional question, not raised by the parties, whether Dalis v. Buyer Advertising Inc., 418 Mass. 220 (1994) was correctly decided. Arguments are scheduled for Feb. 2004. (Distributed to list on file.)
12/16/2003	#7	NOTICE of February argument sent.
01/08/2004	#8	ORDERED for argument on February 3. Notice sent.
01/12/2004	#9	MOTION to extend to January 20 filing of Supp. Br. for MA Comm. Against Discrimination by Beverly I. Ward, Esquire, Steven Locke, Esquire. Allowed. Notice.
01/15/2004	#10	SERVICE of supplemental brief filed for Stonehill College by M. Robert Dushman, Esquire, Amanda Buck Varella, Esquire.
01/15/2004	#11	MOTION to extend to January 23, 2004, filing of Amicus Brief, filed for Nat'l

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

SJC-09100

KEYLAND CORPORATION and JOHN KHEARY
Plaintiffs-Appellees

v.

MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION
and BRENDA RAFFURTY

Defendants-Appellants

ON DIRECT APPELLATE REVIEW FROM A REPORT TO THE APPEALS COURT FROM A JUSTICE IN DUKES COUNTY SUPERIOR COURT

PLAINTIFFS-APPELLEES' SUPPLEMENTAL BRIEF ON ISSUE OF WHETHER *DALIS v. BUYER ADVERTISING, INC.* WAS CORRECTLY DECIDED

The Plaintiffs-Appelles
By:
Attorney Bernard J. Hamill
BBO# 218720
36 Miller Stile Road
Quincy, MA 02169
Tel. (617) 773-6554

On Brief:
Attorney David A. Robinson
BBO# 422880
935 Main Street, Suite 301
Springfield, MA 01103
Tel. (413) 739-4412

difference whether the employee had the right to a jury trial or not. That is what Lavelle holds, in Keyland's view. In Keyland's view, Lavelle is not just an "equal protection" case. Lavelle is an important declaration that Massachusetts is a democracy, not a little room in which a single governmental employee (an MCAD commissioner, MCAD hearing officer, or Superior Court judge) can take away a large sum of a business's or individual's money (property).

Thus, if Dalis is overruled, the SJC should not overrule Lavelle. The SJC should hold that even though the plaintiff does not have the right to a jury trial in an employment discrimination case (except in an age discrimination case, where the Legislature has explicitly given the plaintiff the right to a jury trial), the employer has the right to a jury trial in Superior Court if the MCAD has ordered the employer to pay emotional distress damages to the employee.

If Dalis is overruled and Lavelle is overruled with it, Keyland urges the SJC to also overrule Bournewood Hosp. v. MCAD, 371 Mass. 303, 316 (1976); College-Town Div. of Interco, Inc. v. MCAD, 400 Mass. 156, 161 (1987); and Wynn & Wynn, P.C. v. MCAD, 431 Mass. 655, 674-75 (2000), to the extent that those cases hold that the MCAD can award emotional

APPENDIX C

NO. SJC-9100

KEYLAND CORPORATION and JOHN KHEARY,
Plaintiffs-Appellees,

v.

MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION
and BRENDA RAFFURTY,
Defendants-Appellants.

On Direct Appellate Review From A Report To The Appeals Court From A Justice Of The Dukes Superior Court

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NO. SJC-9112

STONEHILL COLLEGE,
Plaintiff-Appellant,

v.

MASSACHUSETTS COMMISSION AGAINST DISCRIMINATION
and SOO TANG TAN,
Defendants-Appellees.

On Appeal From An Order Of The Bristol Superior Court

BRIEF FOR NEW ENGLAND LEGAL FOUNDATION, ASSOCIATED INDUSTRIES OF MASSACHUSETTS and BOSTON AREA MANAGEMENT ATTORNEYS GROUP AS *AMICI CURIAE*

NEW ENGLAND LEGAL FOUNDATION
and ASSOCIATED INDUSTRIES OF
MASSACHUSETTS

Christine Hughes, BBO #243530
NEW ENGLAND LEGAL FOUNDATION
150 Lincoln Street
Boston, MA 02111
(617) 695-3550

ARGUMENT

This Court erred in holding in Lavelle that a respondent in a G. L. c. 151B proceeding may not obtain a jury trial until the Massachusetts Commission Against Discrimination has taken final action.

This Court has invited amici to address the question of whether Dalis was correctly decided. Amici here respectfully suggest that the issues before the Court are better addressed by a reexamination of the holding in Lavelle that respondents may obtain their jury trial only upon final action of the MCAD. The pending cases demonstrate that Lavelle's attempt to harmonize the intent of the legislature with the demands of the Constitution has failed, both as constitutional law and as public policy.

I. DISSIMILAR JURY TRIAL RIGHTS BETWEEN COMPLAINANTS AND RESPONDENTS VIOLATE EQUAL PROTECTION.

Granting respondents a jury trial right, but delaying it for years, while granting it immediately as of right to complainants, has proved inconsistent with this Court's own articulation in Lavelle of the demands of equal protection:

> If one side to a dispute has a constitutional right to a jury trial, generally the other side must have a similar right. We are dealing here with a fundamental right (art. 15 says the right is sacred), and differing

		Employment Lawyers Assoc. by James S. Weliky, Esquire, Laura M. Unflat, Esquire.
01/15/2004	#12	SERVICE of supplemental brief & appendix filed for Soo Tang Tan by Lawrence J. Casey, Esquire, Nancy S. Shilepsky, Esquire, Patricia A. Washienko, Esquire, Michael A. Bean, Esquire.
01/20/2004	#13	MOTION TO FILE AMICUS BRIEF, filed for New England Legal Foundation & others by Christine Hughes, Esquire and others.
01/20/2004	#14	SERVICE of amicus brief for Amicus New England Legal Foundation & others by Christine Hughes, Esquire. *(18) copies filed addressing additional cases: SJC-9002, SJC-9081, SJC-9100.
01/22/2004	#15	MOTION to File Non-Conforming Brief One-Day Late, filed for MA Comm. Against Discrimination by Robert L. Quinan, Jr., A.A.G.. *Late filing accepted. Referred to the Justices in all other respects.
01/22/2004	#16	SERVICE of supplemental brief filed for MA Comm. Against Discrimination by Robert L. Quinan, Jr., A.A.G.. *10 copies.
01/22/2004	#17	SERVICE of amicus brief for Amicus Jewish Alliance for Law & Social by Joel P. Suttenberg, Esquire. *18 Joint copies filed for SJC-9002, SJC-9081, SJC-9100, SJC-9112.
01/23/2004	#18	SERVICE of amicus brief for Amicus MA Employment Lawyers Assoc. by James S. Weliky, Esquire, Laura M. Unflat, Esquire.
01/23/2004	#19	MOTION to File Supplemental Brief, filed for Soo Tang Tan by Lawrence J. Casey, Esquire, Nancy S. Shilepsky, Esquire, Patricia A. Washienko, Esquire, Michael A. Bean, Esquire. *Referred to the Justices.
01/23/2004	#20	SERVICE of supplemental brief filed for Soo Tang Tan by Lawrence J. Casey, Esquire, Nancy S. Shilepsky, Esquire, Patricia A. Washienko, Esquire, Michael A. Bean, Esquire.
01/23/2004	#21	MOTION TO FILE AMICUS BRIEF, filed for American Civil Liberties Union by Sarah R. Wunsch, Esquire, Anne L. Josephson, Esquire, Ellen J. Zucker, Esquire, James S. Weliky, Esquire, Nadine Cohen, Esquire.

01/23/2004	#22	SERVICE of amicus brief for Amicus American Civil Liberties Union by Sarah R. Wunsch, Esquire, Anne L. Josephson, Esquire, Ellen J. Zucker, Esquire, James S. Weliky, Esquire, Nadine Cohen, Esquire.
01/27/2004	#23	OPPOSITION to Paper #19 (MOTION TO FILE SUPPLEMENTAL REPLY BRIEF), filed by Stonehill College. *Referred to the Justices. Notice sent.
01/29/2004	#24	MOTION to adjust the allocation of oral argument time, filed for MA Comm. Against Discrimination by Robert L. Quinan, Jr., A.A.G.. *Allowed to allocation of requested time for argument.
02/02/2004	#25	MOTION to participate in oral argument, filed for American Civil Liberties Union & othes by Sarah R. Wunsch, Esquire, Anne L. Josephson, Esquire, Ellen J. Zucker, Esquire, James S. Weliky, Esquire, Nadine Cohen, Esquire.
02/03/2004		Oral argument held. (CJM G I S C SN CY).
02/23/2004	#26	Post-Argument letter from Atty. Shilepsky, counsel for Soo Tang Tan. *Distributed to Justices.
02/23/2004	#27	POST-ARGUMENT LETTER from Anne L. Josephson, Esquire for ACLU, Women's Bar Assoc. and others. *Distributed to Justices.
02/26/2004	#28	SERVICE of supplemental amicus brief filed for New England Legal Foundation, Assoc. Industries of Mass. and Boston Area Management Atty. Group by Christine Hughes, Esquire.
02/26/2004	#29	MOTION to File Supplemental Brief, filed for MA Comm. Against Discrimination by Beverly I. Ward, Esquire.
02/26/2004	#30	SERVICE of supplemental brief filed for MA Comm. Against Discrimination by Beverly I. Ward, Esquire, Steven Locke, Esquire, Robert L. Quinan, Jr., A.A.G..
05/06/2004	#31	RESCRIPT (Full Opinion): Stonehill College's request in the Superior Court for a jury trial is struck. The case is to be deemed as a case filed in the Superior Court for review and decision under G. L. c. 30A, on the records prepared before the Massachusetts Commission Against Discrimination in the G. L. c. 151B, s. 5, proceedings. On this basis,

		the case is to stand for further proceedings in the Superior Court.
05/12/2004	#32	Letter from M. Robert Dushman, esquire:...there is a factual error in footnote 23...
05/14/2004	#33	E-mail from Reporter detailing change in opinion.
05/17/2004	#34	LETTER from M. Robert Dushman:... the same factual error occurs in footnote which cross-references footnote 23.
05/19/2004	#35	MOTION for Clarification, filed for Soo Tang Tan by Nancy S. Shilepsky, Esquire, Lawrence J. Casey, Esquire, Patricia A. Washienko, Esquire, Michael A. Bean, Esquire.
05/28/2004	#36	JOINT MOTION to file petition for rehearing late, filed for Stonehill College by M. Robert Dushman, Esquire, Amanda Buck Varella, Esquire.
05/28/2004	#37	(Collective) PETITION FOR REHEARING, filed for Stonehill College by M. Robert Dushman, Esquire, Amanda Buck Varella, Esquire.
06/03/2004	#38	DENIAL of petition for rehearing. (By the Court) Notice to counsel.
06/04/2004		RESCRIPT ISSUED to trial court.
07/01/2004	#39	ORDER (By the Court): After consideration of the various motions and requests of the parties concerning the issue of appellate attorney's fees and costs, the court concludes, and orders, that each of the moving and requesting parties pay their own attorney's fees and costs in connection with the appeals and, therefore, that no attorney's fees and costs in connection with the appeals be assessed either here, or in the trial court, against any respondent should any complaint prevail.
07/15/2004	#40	Motion for reconsideration of the denial of attorney's fees and costs, filed for Soo Tang Tan by Nancy S. Shilepsky, Esquire, Lawrence J. Casey, Esquire, Patricia A. Washienko, Esquire, Michael A. Bean, Esquire. (Denied) By the Court. Notice sent.